

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

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GC Docket No. 92-52

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

RM-7739
RM-7740
RM-7741

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COMMENTS OF BLACK CITIZENS FOR A FAIR MEDIA, *ET AL.*

Black Citizens for a Fair Media, Center for Media Education, Philadelphia Lesbian and Gay Task Force, Telecommunications Research Action Center, The National Association of Puerto Rican Women, the Office of Communication of the United Church of Christ and the Hispanic Association on Corporate Responsibility (collectively referred to here as "BCFM *et al.*"), submit these comments in response to the *Second Further Notice of Proposed Rulemaking*, FCC No. 94-167 (released June 22, 1994) (hereinafter "*Second Further Notice*") in the above-referenced docket.

INTRODUCTION

In the *Second Further Notice*, the Commission solicits additional comments regarding modification of the criteria used in comparative hearings for broadcast licenses.¹ In particular, the Commission asks how it can shape its comparative criteria to comply with the standard set forth in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) ("*Bechtel*").

¹These parties have already filed comprehensive comments and reply comments twice in this proceeding. The first set of comments respond to the Commission's request for comment on various proposals to revise its comparative hearing criteria. See Comments of BCFM, *et al.* filed in response to *Notice of Proposed Rulemaking*, 7 FCC Rcd 2664 (1992) (hereinafter "1992 BCFM Comments"). The second set of comments respond to the Commission's proposal to reinstate a three-year service continuity requirement. See Comments and Reply Comments of BCFM, *et al.* filed in response to *Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5475 (1993) (hereinafter "1993 BCFM Comments").

The *Bechtel* court held that the integration of ownership into management criteria used in comparative hearings are arbitrary and capricious as applied by the Commission. In so doing, the court found that the Commission had not adequately demonstrated, with evidence or otherwise, that the substantive advantages the Commission attributed to integration, *e.g.*, improved station performance resulting from direct financial interest, day-to-day decisions made by those with legal responsibility for the station, more responsiveness to community needs, indeed resulted from that criteria. *Bechtel, supra*, at 882-6. The Court also found that the integration criteria were undercut by two factors: winning applicants can sell their station within a year without any assurance that the buyer will be similarly integrated, and the Commission has no mechanism to ensure that the winning applicant will keep its integration promise. *Id.* at 879-880.

BCFM, *et al.* sympathize with the difficulty of the Commission's task in this proceeding. Justifying the integration or any other comparative criteria under *Bechtel* will be a complex challenge. The Commission should consider seeking judicial or legislative relief from this questionable ruling. The excessively high standard the court has set for the Commission goes far beyond acceptable judicial limits on agency authority - indeed, it is conservative judicial activism at its worst. Nonetheless, it is the law of the land, for the time being.

Even so, BCFM, *et al.* urge the Commission to retain the integration criteria in their present form. Owner-operators are likely to be in a better position to identify and respond to community needs than a non-integrated owner or a professional manager. See 1992 BCFM Comments at 13. However, to have even the slightest chance of defending these or any comparative criteria it may adopt in light of *Bechtel*, the Commission must, at the very least:

1) institute a service continuity requirement (or anti-trafficking rule) of a minimum length of three years for all licensee transactions, including transfers and settlements and 2) institute reporting requirements to ensure that licensees live up to those promises and to form an evidentiary base with which to justify the criteria.

I. AN APPLICANT'S COMPARATIVE PROMISES ARE MEANINGLESS WITHOUT A MANDATORY SERVICE CONTINUITY REQUIREMENT OF AT LEAST THREE YEARS.

The *Bechtel* court correctly points out that the supposed benefits of the integration policy are undercut because a licensee "who had won his station through his integration proposal could 'turn around and sell it....without regard to the buyer's "integration" or lack thereof.'" *Bechtel supra*, at 879 quoting *Bechtel v. FCC*, 957 F.2d 873, 880 ("*Bechtel I*"). The mandate of the Court is clear: a substantial and mandatory service continuity requirement is necessary to justify this and all other comparative criteria.²

Ironically, the observations of this conservative court are identical to what the public interest community has repeatedly argued over the last decade in its futile effort to reinstate an anti-trafficking rule. Comparative promises, and indeed, the entire comparative hearing process, are rendered useless if there is no concurrent obligation upon a licensee to retain its station for a meaningful time period. *See, e.g.*, 1992 BCFM Comments at 2-5; June 17, 1987 Testimony of Andrew Jay Schwartzman on HR 1187 before the Subcommittee on Telecommu-

²While the Commission has proposed a three-year service continuity requirement, *Further Notice of Proposed Rulemaking, supra*, BCFM *et al.* has argued that this requirement should be equal in length to a license term, *i.e.*, five years for a television station, seven years for a radio station. *See* 1993 BCFM Comments at 19.

nications and Finance;³ Brief for Petitioners in *UCC v. FCC*, No. 89-1109 reported at 911 F.2d 813 (1990). This process, in turn, places all regulation under the entire public interest standard at risk - communities are often left without the services of a broadcaster which the Commission has concluded will best serve "the public interest, convenience and necessity."

The purpose of the comparative criteria is to help the Commission predict which of two or more applicants will best serve community needs. An applicant is then chosen on the basis of these characteristics. Without a substantial service continuity requirement, winning applicants can sell their licenses almost immediately. Thus, the community never truly benefits from the promises the applicant made to the Commission. *See BCFM Comments at 3.*

This situation is exacerbated by the fact that the transferee is not subject to any of the comparative promises made by the transferor. *See BCFM Comments at 4 n.2.* The benefits of comparative promises are stripped from the community a second time because the transferee has no obligation to make such promises or adhere to the promises of its predecessor. Indeed, the transferee may be inferior to the unsuccessful applicants in the original hearing. The *Bechtel* court recognized this folly:

While the Commission makes integration a central focus of *allocation*, the Commission takes no interest whatever in the matter when it comes to *transfers* or even in the continuing conduct of the original licensee.

Bechtel, supra, at 887. [Emphasis in original].

By steadfastly refusing to reinstate an anti-trafficking rule, the Commission has dug the

³The one-year trafficking rule "driv[es] out the traditional broadcaster who sinks roots into a community and builds listener loyalty - and profits - through community service. Innovation - anything that may take time to become profitable - is disfavored, and short-term solutions - such as cost cutting through eliminating local production and hypoing ratings with promotional gimmicks, become essential to survival." *Id.* at 2.

hole in which it now stands. Therefore, to have any hope of justifying its comparative criteria, the Commission must reinstate, at a minimum, a three-year holding period for licensees, regardless of whether the licensee obtained the license as a result of a comparative hearing, transfer, or settlement.⁴

II. THE COMMISSION MUST INSTITUTE REPORTING REQUIREMENTS TO ENSURE THAT LICENSEES ARE KEEPING THEIR COMPARATIVE PROMISES AND TO DEMONSTRATE THAT THE CRITERIA REINSTATED THEIR GOALS.

The *Bechtel* court held that a service continuity requirement, without more, would not be enough to justify the integration criteria:

But even if the Commission reaches...a new conclusion in the pending rulemaking, a three-year holding period would still give it no reason to think that integration proposals will "be adhered to on a permanent basis,..."

Bechtel, supra at 880.

Thus, the court found that the integration criteria meant little without some indication that "an applicant who won his station on the basis of his integration proposal continued to operate the station as promised for an appreciable period of time." *Id.* at 879.

The solution to the court's concerns is not a difficult one: the Commission must institute reporting requirements to enable it to evaluate licensee fidelity to commitments made at the comparative hearing.⁵ In addition to fulfilling the court's mandate, reporting requirements are good policy - licensees are accorded public trustee status based on their promises and the

⁴Where there is good cause shown, the Commission can grant waivers for the transfer or assignment of licenses prior to license renewal. See 1993 BCFM Comments at 19.

⁵For example, the Commission could require owner-operators to file semi-annual declarations which demonstrate that they continue to operate the station. Likewise, it could require owner-operators who intend to cease operating the station to notify the Commission.

veracity of their representations to the Commission and should be held accountable for demonstrating their compliance with those promises. This must be the case whether the license is obtained through a comparative hearing, transfer or settlement.⁶ In the event a licensee notifies the Commission that it will no longer comply with its integration promise, *see* footnote 5, *supra*, the Commission should consider imposing early renewal on the licensee.⁷

The court also sharply criticizes the Commission's failure over a 28-year period "to accumulate...evidence to indicate that [integration] achieves even one of the benefits that the Commission attributes to it." *Id.* at 880. While it conceded that an agency can sometimes rely on "predictive judgments," *id.*, the Court nonetheless concluded that the Commission had a "correlative duty to evaluate its policies over time to ascertain whether they work...." *Id.* quoting *Bechtel I*, 957 F.2d at 881.

⁶One loophole of particular concern has resulted from the Commission's egregious inaction on a matter which has been pending for three and one-half years: whether the provisions of Sections 73.1620 (g) and 73.3597 (a) require that whenever all but one applicant in a comparative proceeding "voluntarily" dismiss their applications, the surviving applicant is freed of all divestiture and other commitments. If the Commission does not remedy this problem, its ability to defend any of its comparative criteria will be seriously undermined. *See* June 14, 1991 Further Petition for Reconsideration and/or Clarification filed by BCFM, *et al.* in Docket No. 90-264.

⁷Any Commission effort to ensure compliance with comparative promises would be completely undermined by its current policy which permits entities which are not FCC licensees to lease all or part of a licensee's broadcast day pursuant to a local marketing agreement. *See Report and Order*, 7 FCC Rcd 2755, 2785-9 (1992) *modified in part*, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd (1992). Under this policy, the owner-operator of a leased station becomes nearly irrelevant because he or she no longer makes decisions concerning community responsive programming. A petition for reconsideration of this policy has been pending for some twenty-one months. *See* October 16, 1992 Petition for Further Reconsideration in MM Docket No. 91-140, filed by Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights. The Commission cannot begin to justify its comparative criteria under *Bechtel* until it resolves the issues raised in this petition.

Thus, *Bechtel* requires that the Commission base its judgments on an empirical foundation. While this ruling runs contrary to prior decisions by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit, see *FCC v. WNCN Listeners Guild*, 450 U.S. 593, 594-5 (1981); *UCC v. FCC*, 707 F.2d 1413, 1435 (D.C. Cir. 1983),⁸ the court's mandate can be satisfied by appropriate reporting requirements and diligent Commission oversight. For example, the Commission should consider developing a more detailed issues/programs list which would clearly indicate the quantity and specific type of community responsive programming which a licensee provides. The Commission could then examine a sampling of these lists on an annual basis so as to compile empirical data on the effectiveness of the integration policy.

III. THE COMMISSION SHOULD LIMIT THE ANAX DOCTRINE SO AS TO APPLY ONLY TO OWNER-OPERATORS WHO ARE MINORITIES.

The *Bechtel* court applies some of its most withering criticism to the Commission's contention that integration ensures that those with the "most financial interest" in a station will operate the station, thereby improving station performance. *Bechtel, supra*, at 883.

Directing its attention to the Commission's decision in *Anax Broadcasting Inc.*, 87 FCC2d 483 (1981), the court reasons that because the Commission measures ownership on the

⁸In upholding a Commission policy statement which concluded that the public's interest in diversity is best served by market forces and competition in broadcasting, the Supreme Court stated: "We recognize that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since 'a forecast of direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' *FCC v. WNCN Listener's Guild, supra*, at 594-5 (1981) quoting *FCC v. NCCB*, 436 U.S. 775, 824 (1978); accord, *UCC v. FCC, supra*, at 1435.

basis of "voting power rather than profit share," *Bechtel, supra*, at 883, the owner-manager who has a majority voting interest, but only a tiny equity interest, does not really have the "financial interest" in a station that would affect station performance. *Id.* In *Anax*, the Commission exempted passive owners from the integration calculation if they were sufficiently insulated from exerting control over the licensee. This policy was intended to increase minorities' access to financing.

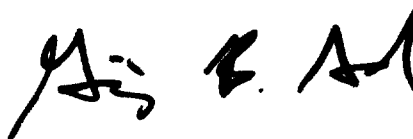
In light of the court's strong disapproval of *Anax*, it appears that the Commission's has extremely limited discretion to retain both the integration criteria and the *Anax* policy as it is applied today. BCFM, *et al.* believes, however, that the Commission may have adequate authority under *Bechtel* to retain the integration credit if it limits the application of *Anax* to permit such a credit only when the proposed owner-operator is a minority. This solution will eliminate the impact of *Anax* in the vast majority of comparative hearings, while at the same time continue to promote its laudable goal of increasing minority ownership of broadcast stations. See *Metro Broadcasting v. FCC*, 497 U.S. 547, 569-72 (1990).

CONCLUSION

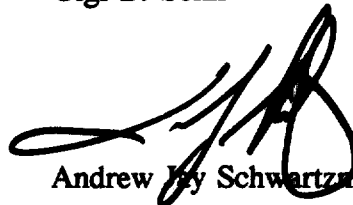
The *Bechtel* court's remand to the Commission is the inevitable consequence of the agency's elimination of a meaningful service continuity standard and the lack of adequate reporting requirements. To begin to comply with the difficult mandate of that case, the Commission must, at the very least, implement 1) a three-year service continuity requirement which will ensure that a licensee will make some investment in its community, and 2) licensee reporting requirements that will enable the Commission to both evaluate a licensee's fidelity to

promises made in the comparative process and substantiate the benefits of these promises.

Respectfully submitted,



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